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RECENT NATURAL RESOURCES CASE

Eminent Domain—Review of Route Selection Made by Public Utility Through Private Wildlife Refuge*

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An interstate natural gas and pipe line company sought to condemn an easement of right of way across a portion of a private, non-profit wildlife preserve. The preserve contested the route selection alleging it would "have a devastating and irreparable effect on its preserve," and that the company had refused to consider alternative routes which "would greatly reduce or largely eliminate the apprehended damage." The trial court, however, ruled that since the preserve was not devoted to a public use, the route selection was within the company's discretion. In *Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc.*, the Supreme Court of New Jersey unanimously reversed, holding that the preserve had undertaken a public function and that the route selection was arbitrarily made because the preserve was denied the opportunity to present evidence on the availability of feasible alternative routes.

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1. Texas E. Trans. Corp. v. Wildlife Preserves, Inc., 48 N.J. 261 225 A.2d 130, 135 (1966). Experts testified that the preserve "is the finest inland, natural fresh water wetland in the entire Northwestern United States . . . ." They objected to the route chosen because it would eliminate the preserve's two best groves of trees thereby effecting the nearby habitat in terms of shade, temperature, and windbreaks, and a number of springs and streams might be substantially damaged which in turn might permanently alter the ecology of the area. Specifically, the excavation required for the pipeline would render the water permanently cloudy thereby blocking the light required by aquatic plant organisms. This would disrupt the food supply of the animals which feed on the organisms. *Id.* at 136-37.
2. Texas E. Trans. Corp. v. Wildlife Preserves, Inc., 89 N.J. Super 1, 213 A.2d 193 (Law Div. 1965). The court held the land was not devoted to a public use because the preserve had voluntarily undertaken the preservation of wildlife rather than being legally obligated to do so.
Texas Eastern represents a new approach to judicial review of the merits of route or site selections made pursuant to a valid exercise of eminent domain, for the court declined to apply two well established doctrines. According to the first, the court will not review the decision to select a parcel of privately owned land in the absence of fraud, bad faith, or circumstances indicating arbitrary or capricious action, which has been interpreted to mean that the court will intervene only to curb clear cases of procedural abuse rather than to review the merits of site or route selections. According to the second doctrine, if the property is currently being put to a public use, the court may decide if the condemnor's use is a more necessary public use, but property devoted to a public use has been defined not to include land used in connection with a "mere voluntary assumption of public service" for the public must have "an enforceable right to a definite and fixed use to the property." The court in Texas Eastern created a new category of land which serves a public function but does not meet the strict requirements of the traditional public use definition and adapted the standard of arbitrariness to review the merits of route and site selections, reasoning as follows:

In such unique cases courts realize that more than a dollar valuation is involved. The public service being rendered must be considered and it cannot be evaluated adequately only in dollars and cents. The


6. In practice the courts generally decline to decide the competitive merits of the competing public uses by treating the question as one of statutory construction deciding only if the legislature gave the condemnor authority to condemn property being put to an existing public use or exempted the property from condemnation. See, e.g., City of Beaumont v. Beaumont Irrigation Dist., 63 Cal. App.2d 291, 46 Cal. Rptr. 465, 405 P.2d 377 (1965); Vermont Hydro-Electric Corp. v. Dunn, 95 Vt. 144, A. 223 2 ALR, 1495 (1921).

7. Texas E. Trans. Corp. v. Wildlife Preserves, Inc., 89 N.J. Super. 1, 213 A.2d 193, 195 Law Div. 1965. The court cited as authority I. Nichols on Eminent Domain §2.2 p. 146 which was apparently a reference to I. Nichols Eminent Domain § 2.2(5) (3d ed. 1964). The rule seems to have originated in a series of cases refusing to classify property held by common carriers to be devoted to a public use because although the property served the public they had no right to demand that the carrier continue to serve them as they could go out of business at any time. See New York, L. & W. R. Co. v. Union Steamboat Co., 99 N.Y. 12, 1 N.E. 27 (1885) and Diamond Jo Line Steamers v. Davenport, 114 Iowa 432, 87 N.W. 399 (1901).
difference is not in the principle but in its application; that is, the quantum of proof required of this defendant to show arbitrariness against it should not be as substantial as that to be assumed by the ordinary property owner who devotes his land to conventional uses.8

The court correctly held that the pipe line company was empowered under section 717(h) of the Natural Gas Act to condemn the land9 and that the preserve was not qualified under the standard definition of land devoted to a public use to determine its exemption from condemnation.10 The court held that because the use made of the land would be a public use if it had been undertaken by the federal or state government the preserve had "a special and unique status . . . lower than that of a public utility but higher than that of an ordinary owner who puts his land to conventional use." The basis for this new classification was federal and state government concern for wildlife conservation manifested by statutes authorizing the expenditure of public monies for the acquisition and management of preserves.11 Having classified the preserve as analogous to land devoted to public use, the decision to review the merits of the route selection was a logical extension of previous New Jersey cases and the recent second circuit decision in Scenic Hudson Preservation Conference v. Federal Power Commission.12

New Jersey has applied the traditional definition of arbitrariness to review route or site selections of privately owned land13 but has

8. 255 A.2d at 137. In remanding the case the court stated, "we express no opinion on the merits of the controversy." Id. at 139. However, a consideration of the merits is implicit in the court's decision that the values represented by the preserve are entitled to greater consideration by the condemnor.
10. This definition has been strictly applied in previous cases. See, e.g., Bailey v. Anderson, 182 Va. 70, 27 S.E.2d 914 (1943) cert. denied 321 U.S. 799 (1943), which held that grist mill was not devoted to a public use even though Virginia law required owner to grind all grain brought by persons for their own or family use.
11. 225 A.2d at 134.
been much more willing than most courts to review the merits of a condemnation decision when the land sought is devoted to a public use even though the condemnor has express statutory authority to condemn the property. In *Weehawken Township v. Erie R.R. Co.*,15 the court refused to allow the township to condemn a portion of a railroad yard for a recreation center without a showing that no alternative sites were available because of the railroad’s demonstrated need for the site. *Weehawken Township* indicates that the New Jersey courts have never defined arbitrariness solely in the terms of procedural abuse but rather have attempted to assure that the condemnor has seriously explored methods of minimizing the disruptive effects of his decision on existing public uses. The court, however, relied most on *Scenic Hudson Preservation Conference v. Federal Power Commission*. The F.P.C. licensed a pump storage project on the Hudson river near historic Storm Mountain. The issue as framed by the Commission in considering the license was “[i]f on this record Con Edison has available an alternative source for meeting its power needs which is better adapted to the development of the Hudson River for all beneficial uses, including scenic beauty, this application should be denied.”16 Nonetheless, the Commission granted the license. The second circuit set it aside and remanded the case for further proceedings because the Commission had failed to consider sufficiently the feasibility of alternative sources of power which would not impair the scenic qualities of the area. The significance of *Scenic Hudson* is the court’s redefinition of the manner in which the F.P.C. must serve the public interest in its license proceedings: “In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.”17

however, been prior dissatisfaction on the New Jersey court with the limited scope of review. In a four to two decision the court held that fraud, bad faith, or abuse of discretion had not been shown when the city condemned a privately owned parking lot to construct a parking garage to be leased to another private operator and granted summary judgment for the city. The condemnee offered to prove that the city owned an equally sizeable lot across the street which contained a school currently being used to store textbooks. The two dissenting judges, which included Chief Justice Vanderbilt, would have ordered a trial on the merits. City of Trenton v. Lenzner, 16 N.J. 465, 109 A.2d 409 (1954).

15. 20 N.J. 572, 120 A.2d 593 (1956).
16. 354 F.2d at 612.
17. Id. at 620.
Thus, the court, in effect, placed an affirmative burden on the Commission to protect the scenic beauty of an area when it is threatened by an F.P.C. licensee and provided this burden could only be discharged by seriously considering alternative development proposals which would be less destructive of an area's scenic beauty.

*Texas Eastern* extends *Scenic Hudson* by applying it to decisions initially made by private rather than governmental bodies and by explicitly shifting the burden of proof to the condemnor to disprove the feasibility of proposed alternatives. The condemnee, of course, still has the ultimate burden of proving that the selection was arbitrarily made but under *Texas Eastern*, having introduced evidence that the ecology or scenic beauty of an area would be seriously damaged as the result of the route or site selection and that feasible alternatives are available, the burden of going forward with the evidence shifts to the condemnor. As a practical matter he must now disprove the feasibility of the proposed alternatives. In the application of *Texas Eastern* to future decisions two major issues are left unanswered. What kinds of uses of land can be classified as analogous to public use? To what extent can the condemnor discharge the burden of proof by showing that the proposed alternative is more costly than his original selection? The decision also raises more basic questions about the propriety of judicial intervention in the route and site selection process to accord greater protection to scenic beauty and related values.

The court discounted the possibility that the duty to consider alternatives imposed on the condemnor was unconstitutional as an undue burden on interstate commerce stating that this was a different case from denial of plaintiff's right to condemn a necessary portion of the preserve which would be clearly unconstitutional. The court did not discuss *Transcontinental Gas Pipeline Corp. v. Borough of Milltown*, an earlier federal district court opinion from New Jersey. A borough attempted to exclude a pipeline from a residential section of the city by a zoning ordinance alleging that the pipeline was unsafe and that alternative routes were available. The court found that the safety claims were not substantiated by expert testimony and refused to consider alternative routes reasoning, "The fact remains that the mere claim by defendant that its ordinance requires plaintiff to locate its pipeline in an alternative route . . . does not

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fortify it with the power to impede plaintiff in the prosecution of its legal objective in the field of interstate commerce.”

However, Transcontinental is distinguishable from Texas Eastern. The preserve proved that actual damage would be caused by the route chosen, while the borough could prove none, and the borough, unlike the preserve, did not propose a specific alternative route. Further, close factual analysis of the impact of the duty imposed in Texas Eastern suggested by the Supreme Court in Arizona v. Southern Pacific Co. and Bibb v. Navajo Freight Lines should lead to the conclusion that the requirements that “feasible” or “reasonable” alternatives be considered does not conflict with the congressional policy of the free flow of fuel from producing to consumer states.

The court based its classification on state and federal statutes which demonstrate a clear public concern for the preservation of wildlife. Prior statutory recognition that the condemnee’s use serves a public purpose could function as the standard for future decisions. It would relieve the courts of the necessity to make subjective ecological and aesthetic value judgments about a variety of land uses. However, this standard would be rejected because it is too narrow. It would eliminate judicial review of the merits of decisions to condemn many parcels of land or other natural resources simply because Congress or the state legislature has not yet decided the values they represent are worthy of public protection and enhancement.

A case in point is in the Napa Valley north of San Francisco which has been described as a “unique resource, praised and treasured not only for the wines and fruits produced in its vineyards and orchards, but for its glorious settings and as the beautiful green retreat it represents for millions in the crowded Bay Area cities.”

Suppose a utility proposes overhead powerlines through the heart of a well-known vineyard because their engineers have decided it is the most economically efficient route. A strong case can be made for the need to preserve the vineyard both because of a shortage of prime irrigable land in California and the need for open space and

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20. Id. at 295.
22. 359 U.S. 520 (1939).
23. This has been proposed as the standard to determine the analogous question of standing to sue to assert conservation values. See Note, Standing to Sue and Conservation Values, 38 Colo. L. Rev. 391, 405 (1966).
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recreation areas around urban concentrations. A Napa Valley National Vineyard has been proposed but neither Congress nor the State of California has yet acted. Under a strict interpretation of Texas Eastern a court could refuse to allow a condemnee to present evidence on the availability of alternative routes.

It should be realized that the court in Texas Eastern was not merely protecting an isolated wildlife refuge but that it was protecting the integrity of an “environmental corridor” adjacent to a densely populated urban area. An “environmental corridor” is formed by an area’s major scenic resources and cultural amenities. Specialists in environmental design and landscape architecture are devising objective methods of identifying these resources and amenities and when they are plotted on a map the “environmental corridor” is delineated. Selected area studies indicated that ninety percent of an area’s cultural amenities are clustered in linear patterns usually following a water course. Thus, the condemnor should be allowed to introduce evidence of alternatives when his land lies within such an “environmental corridor” and contains scenic resources or cultural amenities. This should give the court flexible yet objective standards to protect the types of land uses society is coming to realize should be maintained.

The court gave little indication of the cost differential which must

25. See Mumford, Townscape and Landscape, The Highway and the City (Harcourt, Brace, & World, Inc. 1963).
27. The court could find the necessary statutory policy in the California Land Conservation Act of 1965, Cal. Gov’t. Code § 51200-95, and the Breathing Space Amendment to the state constitution, Cal. Const. art 28, § 2, which permit land to be restricted for recreation, the enjoyment of scenic beauty, or the production of food and fiber and to be assessed at its current restricted use. See Comment, Assessment of Farmland Under California Land Conservation Act and the “Breathing Space” Amendment, 55 Calif. L. Rev. 273 (1967).
28. The concept of an “environmental corridor” is taken from a presentation made by Professor Philip H. Lewis, professor of Landscape Architecture at the University of Wisconsin, at a conference on Scenic Easements in Action held at the University of Wisconsin, December 16-17, 1966. A Manual for the Conference Workshops and the Conference Proceedings have been published by the University of Wisconsin.
29. Professor Lewis has inventoried cultural attractions under 260 headings, each identified by a symbol. These include wildlife preserves, orchards and a general store. Manual for the Conference Workshops, p. 4 (U. of Wis. 1966).
30. Id. at 2.
31. See Twiss and Litton, Resource Use in the Regional Landscape, 6 Natural Resources J. 76 (1966).
be borne by the condemnor if the alternative route proves more costly except to indicate that cost was one of the factors which went into a determination of feasibility and to make it clear that "within reasonable limits the fact that an alternative route will be more expensive should not deter its selection by a utility, if the public convenience and necessity are better served thereby."\textsuperscript{82} The court in \textit{Scenic Hudson} put the matter directly in stating that future F.P.C. licensing proceedings "must include as a basic concern the preservation of natural beauty . . . keeping in mind that in our affluent society, the cost of the project is only one of several factors to be considered."\textsuperscript{83}

The question of how much of the cost of preserving ecologic and scenic values can be shifted to the condemnor ultimately involves the propriety of judicial intervention in decisions such as \textit{Texas Eastern}. To approach an answer it is necessary to examine the major assumptions which appear to underlie the court's reasoning. The first is that there is a need to preserve a balance between man and his natural environment. Several practical reasons for doing so have been proposed such as the need to preserve a research laboratory for the ecologist or the prevention of floods, but in many instances the decision involves one's personal sense of aesthetics.\textsuperscript{84} The court seems to base its opinion on the fact that this need is shared by a significant portion of the community and that existing natural resources allocation decisions give little weight to preserving ecologic and scenic values because they have little or no market price. The second is that the increasing number of bodies possessing the power of eminent domain and the consequent competition for land means that condemnors must be made more responsive to the impact of their decisions on the community than they have been in the past.

The third is that decisions such as those made in \textit{Scenic Hudson} and \textit{Texas Eastern} are planning and allocation decisions in the broadest sense of the term but the decision makers are not making the inquiries planning theory suggests ought to be made.\textsuperscript{85} The factors considered are often phrased in objective terms such as the

\textsuperscript{82} 225 A.2d at 138.
\textsuperscript{83} 354 F.2d at 624.
\textsuperscript{84} Mr. Justice Douglas has attempted to analogize these ecologic and scenic values to guarantees contained in the Bill of Rights. Douglas, \textit{A Wilderness Bill of Rights} (1965). For a criticism of his position see Tarlock, \textit{Book Review}, 19 Stan. L. Rev. 895 (1967).
\textsuperscript{85} For a full elaboration of this idea see Reich, \textit{The Law of the Planned Society}, 75 Yale L.J. 1227 (1966).
calculation of the cost-benefit ratio but this tends to obscure the fact that these purported objective criteria mask a number of subjective value judgments and policy considerations. Specifically, there are two inquiries which planners should make but which are not generally made in any meaningful sense in many natural resources allocation decisions. Professor Kevin Lynch has described them as follows:

The objectives will be weighted toward those that affect the community as a whole, or large groups within the community, with emphasis on groups that are normally less vocal in community decisions. There will be a similar weighting toward longer periods of time and unborn generations: the future will be discounted less than by other advisers or decision-makers. . . . Where possible, the scope of the goals will be expanded to be more nearly inclusive of all the major relevant values and problems of the community, in order to prevent sub-optimizing.

The final assumption is that courts must begin to re-evaluate their traditional reluctance to undertake substantive review of these kinds of controversies in order to help reduce increasing inter-governmental conflicts over the use of our natural resources to prevent the waste of public monies. For example, the Bureau of Reclamation has announced its intention to divert substantial amounts of water for irrigation from the American River near Sacramento, California, while other federal, state and local agencies are spending millions of dollars to develop the area as a river parkway. Administrative resolution of these conflicts seldom insures substantial consideration of wildlife, ecological, or aesthetic values as most natural resources agencies or public utilities view the problem from a limited perspective as they are not structured to consider all potential uses of a resource.

These assumptions suggest that the new approach to judicial re-

38. For a case typical of judicial reluctance to intervene in these controversies see State of Washington v. F.P.C., 207 F.2d 391 (9th. Cir. 1953) where the court concluded in the face of allegations that the F.P.C.'s license conditions were inadequate to preserve anadromous fish, "if the dams will destroy the fish . . . we are powerless to prevent it." Id. at 398.
view represented by *Scenic Hudson* and *Texas Eastern* is sound and ought to be continued. It is time to recognize that those who have the power to accelerate the decline in environmental quality ought to bear the costs of arresting that decline just as we have already decided, for example, that a land developer who contributes to community problems such as increased traffic or a shortage of recreation space ought to bear the costs of minimizing the burdens he has cast on the community.\(^{40}\) Constitutional limitations such as the due process and equal protection clauses can be used to prevent the imposition of excessive costs on the condemnor.\(^{41}\) The role of the judiciary in protecting environmental quality will be limited compared to the power of the legislature but the courts can try to insure that the decision making process comports with some idealized notion of the planning process by broadening the range of values which must be seriously considered in a condemnation decision, and by attempting to minimize conflicts over the use of natural resources by requiring the decisions be made only after alternative methods of eliminating them have been thoroughly explored.\(^{42}\)

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\(^{42}\) The location of public utility transmission lines has recently become a matter of Congressional concern. Several bills have been introduced in Congress to require greater public review of route selections which threaten an area's ecologic, historic, and aesthetic values. *See e.g.*, in the 90th Cong., 1st Sess., S. 1843, 1835, 1934, and 2227 and H.R. 11809 and 12322.